In the Matter of:

OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

PLAINTIFF,

v.

JPMORGAN CHASE & COMPANY,

DEFENDANT.

ARB CASE NO. 17-063

ALJ CASE NO. 2017-OFC-007

DATE: October 5, 2017

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

***For the Plaintiff*:**

Nicholas C. Geale, Esq.; Jeffrey Rogoff, Esq.; Anna Laura Bennett, Esq.; and Alexander M. Kondo, Esq.; U.S. Department of Labor, Office of the Solicitor, Washington, District of Columbia

***For the Defendant*:**

William E. Doyle, Esq.; *McGuireWoods LLP*, Raleigh, North Carolina; Bruce M. Steen, Esq; *McGuireWoods LLP*, Charlotte, North Carolina; and Elena D. Marcuss, Esq; *McGuireWoods LLP*, Baltimore, Maryland

Before: Joanne Royce, *Administrative Appeals Judge*; Leonard J. Howie III, *Administrative Appeals Judge*; and Tanya L. Goldman, *Administrative Appeals Judge*

ORDER DENYING PETITION FOR INTERLOCUTORY REVIEW

This matter arises under the affirmative action and nondiscrimination requirements of Executive Order 11246 (EO 11246), as amended.[1] EO 11246 authorizes the Department of

[1] Executive Order 11246, 30 Fed. Reg. 12,319 (Sept. 24, 1965), was amended by Executive Order 11375; 32 Fed. Reg. 14,303 (Oct. 13, 1967) (adding gender to list of protected characteristics),

Labor's (DOL) Office of Federal Contract Compliance Programs (OFCCP) to ensure that Federal contractors and subcontractors doing business with the Federal government comply with the laws and regulations requiring nondiscrimination and equal opportunity in employment, as implemented through 41 C.F.R. Part 60-30 (2017). OFCCP filed an Administrative Complaint alleging that JPMorgan Chase & Company (JPMorgan), as a government contractor, violated EO 11246 and its implementing regulations "by discriminating against female employees with regard to compensation." *See* Jan. 17, 2017 Admin. Compl. at ¶ 13. JPMorgan filed a Motion to Dismiss the Administrative Complaint with a DOL Administrative Law Judge (ALJ), for failure to state a claim. Specifically, JPMorgan contends that the plausibility standard for stating a claim under Federal Rule of Civil Procedure (Fed. R. Civ. P.) 8, as set forth in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (*Iqbal/Twombly*) applies to OFCCP administrative complaints and is not satisfied by the OFCCP's administrative complaint in this case.

The ALJ denied JPMorgan's motions to dismiss for failure to state a claim and for reconsideration, and denied JPMorgan's subsequent request for the ALJ to certify the issue for interlocutory review by the Administrative Review Board (ARB or Board) as provided by 28 U.S.C. § 1292(b). JPMorgan filed a petition for interlocutory review with the Board. Because JPMorgan has failed to establish a basis for departing from the Board's general rule against accepting interlocutory appeals, we deny the petition for interlocutory review.

ISSUE

Although the ALJ denied JPMorgan's request to certify for interlocutory review the issue of whether OFCCP failed to state a claim, JPMorgan argues that exceptional circumstances exist in this case to warrant interlocutory review through a writ of mandamus as provided for in *Cheney v. U.S. District Court for the District of Columbia*, 542 U.S. 367, 380-381 (2004).[2] The Secretary's Order delegating authority to the Board to issue final agency decisions in cases arising under EO 11246[3] "does not specifically delegate mandamus authority to the Board," and the Board has declined to decide the issue or recognize such authority." *Lewis v. Metro. Transp. Auth.*, ARB No. 11-070, ALJ No. 2010-NTS-003, slip op. at 2 (ARB Aug. 8, 2011).[4] The Board

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and Executive Order 12086, 43 Fed. Reg. 46,501 (Oct. 5, 1978) (consolidating enforcement function in the Department of Labor).

[2] In *Cheney*, the Court held that the party seeking such review must meet three criteria: (1) he "must have no other adequate means to attain the relief he desires," (2) he must show "that [his] right to issuance of the writ is 'clear and indisputable,'" and (3) the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances. *Id.* (citations omitted).

[3] Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,379 (Nov. 16, 2012).

[4] *See also Jordan v. Sprint Nextel Corp*., ARB No. 06-105, ALJ No. 2006-SOX-041, slip op. at 7 (ARB June 19, 2008) ("whether the Secretary of Labor's delegation to the Board includes

concludes that there are no exceptional circumstances warranting mandamus or other means of interlocutory review in this case. We note first that 41 C.F.R. Part 60-30 and cases interpreting it do not provide a mechanism for interlocutory review. We next determine that there are no "exceptional circumstances" warranting interlocutory review under our delegated authority.[5] Finally, we conclude that even if mandamus authority is available, JPMorgan fails to demonstrate that such review is warranted here.

DISCUSSION

1. The implementing regulations do not provide a mechanism for interlocutory review in EO 11246 administrative proceedings

As a preliminary matter, the implementing regulations for EO 11246 do not provide any mechanism for interlocutory review. The regulations in two separate locations provide for the filing of exceptions with the ARB, but only after receipt of the ALJ's recommended decision. 41 C.F.R. § 60-30.19(b) specifically provides that "[r]ulings by the Administrative Law Judge shall not be appealed prior to the transfer of the case to the Secretary, but shall be considered by the Secretary upon filing exceptions to the Administrative Law Judge's recommendations and conclusions." The "Post-Hearing Procedures" section similarly allows for filing exceptions with the ARB only after receipt of the ALJ's recommended decision:

> Within 14 days after receipt of the recommended findings, conclusions, and decision, any party may submit exceptions to said recommendation. These exceptions may be responded to by other parties within 14 days of their receipt by said parties. All exceptions and responses shall be filed with the Administrative Review Board, United States Department of Labor.

41 C.F.R. § 60-30.28. The Secretary has pointed to both of these provisions as prohibiting interlocutory review. In *OFCCP v. Kimmins Abatement Corp*., No. 1994-OFC-020, slip op. at 1 (Sec'y Nov. 3, 1994), the Secretary held that "not only does no authority exist for interlocutory appeals of an ALJ's procedural rulings in cases under the OFCCP Rules of Practice, 41 C.F.R. Part 60-30, the regulations restrict review by the Secretary until the ALJ has submitted a recommended decision. 41 C.F.R. § 60-30.19(b)." A year later, the Secretary re-affirmed this conclusion in *OFCCP v. Cleveland Clinic*, No. 1991-OFC-020 (Sec'y Apr. 18, 1995):

> There is no provision in the OFCCP Rules of Practice, 41 C.F.R. Part 60-30, for filing exceptions to an ALJ's rulings on selected

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mandamus authority has not yet been determined"); *Somerson v. Eagle Express Lines Inc*., ARB No. 04-046, ALJ No. 2004-STA-012, slip op. at 2 (ARB May 28, 2004) ("[t]he Secretary's Order does not specifically delegate mandamus jurisdiction to the Board"), and at 3, n.2 ("[t]he ARB declines, at this time, to decide the issue of whether the Board has the authority to issue a Writ of Mandamus").

[5] Secretary's Order No. 02-2012 § 5 provides the Board with "the discretionary authority to review interlocutory rulings in exceptional circumstances, ..."

> issues in a case. The regulations provide that an ALJ shall "recommend findings, conclusions and a decision," 41 C.F.R. § 60-30.27, and "any party may submit exceptions to said recommendation." 41 C.F.R. § 60-30.28.

Id. at 1.

The United States Court of Appeals for the Seventh Circuit has also noted that interlocutory review to the Secretary is not available. *Uniroyal, Inc. v. Marshall*, 579 F.2d 1060, 1064-1065 (7th Cir. 1978). In *Uniroyal*¸ the Seventh Circuit denied an interlocutory appeal to address an ALJ's denial of a petitioner's challenge of the DOL's authority to issue the pre-hearing discovery regulations at 41 C.F.R. Part 60-30: "[T]the regulations provide for review of such rulings by the Secretary after the administrative law judge has issued his administrative decision." *Id.* at 1065 (citing § 60-30.19(b)). The court reasoned that the regulations do not provide a means for interlocutory review:

> Uniroyal must await the final decision of the Secretary of Labor before obtaining judicial review. The applicable regulations provide that interlocutory rulings of the administrative law judge are not appealable to the Secretary until the administrative law judge transfers the case to the Secretary. § 60-30.19(b). Before those rulings become final, the administrative law judge must issue his recommended findings, conclusions and decision, and certify the record to the Secretary. § 60-30.27. After the parties are given an opportunity to file exceptions to the administrative law judge's ruling, the Secretary issues a final decision, which is then subject to judicial review. 5 U.S.C. § 704.

Id. at 1064. The Secretary followed *Uniroyal* in *U.S. Department of the Treasury v. Harris Trust and Savings Bank*, No. 1978-OFCCP-002, slip op. at 1 (Sec'y May 10, 1979), involving an interlocutory appeal of an ALJ's discovery orders in an EO 11246 case. *Id.* ("The Rules of Practice applicable to these proceedings (Title 41 C.F.R. Part 60-30) provide for no such interlocutory appeal.").

Nonetheless, we recognize that our precedent is not uniform, *see, e.g., OFCCP v. Honeywell, Inc.*, No. 1977-OFCCP-003, slip op. at 1, 3 (Sec'y Jun. 2, 1993) (issuing a partial decision following an ALJ's Recommended Interlocutory Decision and Order in an effort to motivate the parties to resolve over 10 years' of litigation through voluntary mediation), and further that the Secretary has never reconciled the language of the regulations with his Order delegating authority, which allows for interlocutory review in exceptional circumstances.[6] Thus, the Board considers below the circumstances under which we might grant interlocutory review.

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[6] In addition, while noting this same regulatory and case precedent, the Solicitor has not argued in its opposition that interlocutory review is unavailable on this basis. *But see* Pl.'s Opp'n at 2 n.1.

2. There are no "exceptional circumstances" warranting interlocutory review

As noted, the Secretary of Labor has delegated to the Board the authority to issue final agency decisions upon appeals of decisions of DOL ALJs in cases arising under EO 11246. Secretary's Order No. 02-2012 § 5(c)(13). The Order explicitly provides that "[t]he Board's authority includes the discretionary authority to review interlocutory rulings in exceptional circumstances, provided such review is not prohibited by statute." *Id.* at § 5.[7] "[A]lthough the Board may accept interlocutory appeals in 'exceptional' circumstances, it is not the Board's general practice to accept petitions for review of non-final dispositions issued by an ALJ." *Turin v. Amtrust Fin. Servs., Inc.*, ARB No. 17-004, ALJ No. 2010-SOX-018, slip op. at 3 (ARB Apr. 20, 2017). The Secretary of Labor and the Board have held many times that interlocutory appeals are generally disfavored and that there is a strong policy against piecemeal appeals. *Id.*; *OFCCP v. Bank of America*, ARB No. 10-048, ALJ No. 1997-OFC-016, slip op. at 4 (ARB Apr. 29, 2010) (citing cases).

When a party seeks interlocutory review of an ALJ's non-final order, the ARB has generally followed one or more of three different approaches: (1) use the procedures set forth in 28 U.S.C. § 1292(b); (2) consider whether the collateral order exception applies; or (3) consider whether review would be consistent with the Secretary's reasons for granting review in *Honeywell* ("*Honeywell* factors"). JPMorgan advances a fourth approach—a writ of mandamus. We consider each in turn as our best guidance on what might constitute "exceptional circumstances." None suggest that interlocutory review is warranted in this case.

Primarily, the Board has elected to look to the interlocutory review procedures as set forth at 28 U.S.C. § 1292(b), which provides for certification of issues involving a controlling question of law as to which there is substantial ground for difference of opinion, an immediate appeal of which would materially advance the ultimate termination of the litigation.[8] *Plumley v.*

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[7] This same paragraph also states, however, that "[t]he Board shall not have jurisdiction to pass on the validity of any portion of the Code of Federal Regulations that has been duly promulgated by the Department of Labor *and shall observe the provisions thereof, where pertinent, in its decisions*. . . . In issuing its decisions, *the Board shall adhere to the rules of decision and precedent applicable under each of the laws enumerated in Sections 5(a), 5(b), and 5(c) of this Order*, until and unless the Board or other authority explicitly reverses such rules of decision or precedent. *Id.* (emphasis added). EO 11246 is listed under Section 5(c).

[8] In *Welch v. Cardinal Bankshares Corp.*, ARB No. 04-054, ALJ No. 2003-SOX-015, slip op. at 5 (ARB May 13, 2004), the petitioner for interlocutory review argued that it was not necessary for the Board to follow the certification procedures under section 1292(b) because the Secretary's Order provides the Board "the discretionary authority to review interlocutory rulings in exceptional circumstances." But the Board held that when the Secretary's Order was originally issued, "the authority of the Secretary, and later of the Board, to consider interlocutory appeals from administrative law judge decisions was already well established." *Welch*, ARB No. 04-054, slip op. at 5 (citing *Plumley*, No. 1986-CAA-006). Thus, the Board noted that:

> the Secretary's Order did not confer upon the Board new or additional authority to consider interlocutory appeals. It simply recognized and

Federal Bureau of Prisons, No. 1986-CAA-006, slip op. at 3 (Sec'y April 29, 1987); *Turin*, ARB No. 17-004, slip op. at 3. But as JPMorgan concedes, Def.'s Pet. at 10, because the ALJ denied its motion to certify the question of law it raised (failure to state a claim), "an appeal from an interlocutory order such as this may not be taken" pursuant to section 1292(b). *Plumley*, No. 1986-CAA-006, slip op. at 3; *see also Johnson v. U.S. Bancorp*, ARB No. 11-018, ALJ No. 2010-SOX-037, slip op. at 3 n.14 (ARB Mar. 14, 2011) ("The whole point of § 1292(b) is to create a dual gatekeeper system for interlocutory appeals: Both the district court and the court of appeals must agree that the case is a proper candidate for immediate review before the normal rule requiring a final judgment will be overridden.") (quoting *In re Ford Motor Co.*, 344 F.3d 648, 654 (7th Cir. 2002)).

"[E]ven if a party has failed to obtain interlocutory certification, the ARB would consider reviewing an interlocutory order meeting the 'collateral order' exception to finality that the Supreme Court recognized in *Cohen v. Beneficial Indus. Loan Corp*., 337 U.S. 541 (1949)." *Turin*, ARB No. 17-004, slip op. at 3. JPMorgan does not address or argue the collateral order exception requirements either, presumably because the ALJ's denial of JPMorgan's motion to dismiss does not involve a collateral order. *See, e.g., Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1133 (D.C. Cir. 2004) ("Denial of a motion to dismiss for failure to state a claim under Rule 12(b)(6) is not ordinarily subject to interlocutory appeal. It is neither a final decision nor a proper subject for appeal under the "collateral order" doctrine. Whether conclusive or not, it plainly is not separate from the merits.").

The Board has also periodically looked to *OFCCP v. Honeywell, Inc*., No. 1977-OFCCP-003 (Sec'y June 2, 1993), for guidance on when interlocutory review may be appropriate. *See, e.g., Bank of America*, ARB No. 10-048, slip op. at 7; *Dempsey v. Fluor Daniel, Inc.*, ARB No. 01-075, ALJ No. 2001-CAA-005, slip op. at 3-4 (ARB May 7, 2002)*; OFCCP v. Interstate Brands Corp*., ARB No. 00-071, ALJ No. 1997-OFC-006, slip op. at 2-3 (ARB Sept. 29, 2000); In *Honeywell*, the Secretary accepted and ruled on an interlocutory appeal in an EO 11246 case, as the "case involved many threshold procedural and substantive issues of interpretation of E.O. 11,246" and "neither party objected to the Secretary's review of the ALJ's order as an interlocutory appeal." *Cleveland Clinic*, No. 1991-OFC-020, slip op. at 1, n.1 (rejecting interlocutory review and distinguishing *Honeywell* as "the unusual case"). The Board later noted that the Secretary reviewed the interlocutory appeal in *Honeywell* because it involved "threshold legal issues the resolution of which would encourage the parties to engage in voluntary mediation." *Interstate Brands Corp*., ARB No. 00-071, slip op. at 2; *see also Honeywell*, No. 1977-OFCCP-003, slip op. at 1, 10 (inviting parties "to engage in voluntary mediation").

> confirmed already existing precedent that established the Secretary's and the Board's authority to consider such appeals. The certification process is the long-standing procedure the Secretary adopted to govern the interlocutory appeal process. Accordingly, the Secretary's Order . . . did not relieve [the petitioner for interlocutory appeal] from complying with the certification procedure for obtaining interlocutory review.

Welch, ARB No. 04-054, slip op. at 5-6.

Honeywell is distinguishable, however, from this case, as JPMorgan "has identified no threshold legal issues the resolution of which would encourage the parties to engage in voluntary mediation."[9] Further, "the OFCCP in this case (unlike in *Honeywell*) does object to the interlocutory appeal." *Interstate Brands Corp.*, ARB No. 00-071, slip op. at 3; *Bank of America*, ARB No. 10-048, slip op. at 7.

Finally, pretermitting the question of whether we have authority to grant a writ of mandamus, *see Lewis*, ARB No. 11-070; *Somerson*, ARB No. 04-046, JPMorgan also has not demonstrated that the circumstances exist in this case to satisfy the criteria set forth in *Cheney* to warrant interlocutory review through a writ of mandamus.[10] Although JPMorgan asserts that there is no alternative means to address the denial of its motion to dismiss for a failure to state a claim, as an appeal after discovery and an adjudication on the merits would be futile, Def.'s Pet. at 9, it is not uncommon for courts to deny interlocutory review of motions to dismiss. *Kilburn*, 376 F.3d at 1133 ("Denial of a motion to dismiss for failure to state a claim under Rule 12(b)(6) . . . . is eminently reviewable on appeal from the final judgment; indeed, that is the usual way in which Rule 12(b)(6) decisions are appealed.").[11]

Moreover, JPMorgan has not demonstrated "that [its] right to issuance of the writ is 'clear and indisputable.'" *Cf. Byrd v. Reno*, 180 F.3d 298, 303, 336 (D.C. 1999) (plaintiff "has not met her burden of demonstrating that her right to mandamus is clear and indisputable because it is far from clear that the district court erred"). As the ALJ notes in denying JPMorgan's motion to dismiss, OFCCP's regulations at 41 C.F.R. § 60-30.5(b) provide an applicable pleading standard for OFCCP complaints filed pursuant to EO 11246. Thus, the ALJ's contrary ruling is a reasonable interpretation. *See also Evans v. EPA*, ARB No. 08-059,

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[9] For example, even if the Board accepted this interlocutory appeal and ruled in JPMorgan's favor, holding that the *Iqbal/Twombly* plausibility standard for stating a claim under Fed. R. Civ. P. 8 applies to an OFCCP administrative complaint; the ALJ could hold on remand that OFCCP's administrative complaint satisfies that standard. Or, if the ALJ concluded that the complaint did not meet the standard, OFFCP could amend, assuming no answer has been filed, or seek leave to amend, which the ALJ would likely allow. 41 C.F.R. § 60-30.5(c) (noting that "leave shall be freely given where justice so requires."). Thus it does not appear that a ruling on this issue is likely to encourage the parties to resolve the case at this stage. Indeed, to the contrary, the OFCCP's administrative complaint alleges that OFCCP "attempted . . . conciliation efforts" but they were "unsuccessful." Compl. at ¶ 26.

[10] The Supreme Court has described mandamus as "a 'drastic and extraordinary' remedy 'reserved for really extraordinary causes.'" *Cheney*, 542 U.S. at 380 (quoting *Ex parte Fahey*, 332 U.S. 258, 259-260 (1947)). The Court further noted that "'only exceptional circumstances amounting to a judicial usurpation of power,' or a 'clear abuse of discretion,' 'will justify the invocation of this extraordinary remedy.'" *Id.* (quoting *Will v. United States*, 389 U.S. 90, 95 (1967); *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383 (1953)).

[11] *See also Mercantile Nat. Bank at Dallas v. Langdeau*, 371 U.S. 555, 574 (1963) ("To rely on the hardship of being subjected to trial is to do away with the distinction between interlocutory and final orders. It is for this reason that the Court has always held that the hazard of being subjected to trial does not invest a preliminary ruling with the finality requisite to appeal.").

ALJ No. 2008-CAA-003, slip op. at 9 (ARB July 31, 2012) (in deciding a Fed. R. Civ. P. 12(b)(6) motion for failure to state a claim, claim should not be evaluated under the *Iqbal/Twombly* standard for administrative whistleblower complaints filed before the DOL).

Consequently, given that none of the recognized possible "extraordinary circumstances" for interlocutory review have been established, JPMorgan has failed to establish a basis for departing from the Board's general rule against accepting interlocutory appeals. Accordingly, JPMorgan's petition for interlocutory review is denied and the case is remanded to the ALJ for further proceedings and to issue a recommended decision resolving this case in its entirety.

CONCLUSION

Finding that JPMorgan has failed to establish any basis for departing from our general rule against accepting interlocutory appeals, we **DENY** its petition for interlocutory review and we **REMAND** this case to the ALJ for further proceedings and to issue a recommended decision resolving this case in its entirety.

SO ORDERED.

TANYA L. GOLDMAN
Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

LEONARD J. HOWIE III
Administrative Appeals Judge